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Supreme Court, U.S.
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No. 02-575

In The
Supreme Court of the United States

NIKE, INC., et al.,

Petitioners,

v.

MARC KASKY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of California

BRIEF FOR THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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3 HP

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. CALIFORNIA'S BROAD STANDING PROVISION FOR CONSUMER PROTECTION ACTIONS IS NOT FACIALLY UNCONSTITUTIONAL	4
A. The State of California's Decision To Authorize Equitable Actions By Non-Injured Individuals Is Not Unconstitutional	4
B. California Law Contains Significant Limitations On The Ability Of An Uninjured Plaintiff To Recover Monetary Relief Under The UCL	12
II. THE CALIFORNIA COURT PROPERLY FOUND THAT AT LEAST SOME OF NIKE'S STATEMENTS WERE "COMMERCIAL SPEECH"	16
A. For Purposes Of The Commercial Speech Doctrine, Claims About A Product's Manufacture Or Origin Are A Type Of Product Claim	16
B. Improper "Viewpoint Discrimination" Is Not An Issue In This Case	20

TABLE OF CONTENTS – Continued

Page

III. ACCURATE ADVERTISING ABOUT PRODUCTS AND SERVICES SERVES AN IMPORTANT ROLE IN OUR FREE ENTERPRISE SYSTEM; INACCURATE INFORMATION HAMPERS FAIR COMPETITION AND INJURES CONSUMERS 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 21

Association of National Advertisers, Inc. v. Lungren, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) 18

Baker v. G. C. Services Corp., 677 F.2d 775 (9th Cir. 1982) 6

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 22

Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288 (2001) 10

Canon U.S.A., Inc. v. Superior Court, 68 Cal.App.4th 1 (1998) 15

Corbett v. Superior Court, 101 Cal.App.4th 649 (2002) 2

Cortez v. Purolator Air Filtration Products, Inc., 23 Cal.4th 163 (2000) 14

Demando v. Morris, 206 F.3d 1300 (9th Cir. 2000) 6

Dzadovsky v. Lyons Ford Sales, Inc., 593 F.2d 538 (3rd Cir. 1979) 6

Edenfield v. Fane, 507 U.S. 761 (1993) 24

Edwards v. Your Credit, Inc., 148 F.3d 427 (5th Cir. 1998) 6

Equilon Enterprises, LLC v. Consumer Cause, Inc., 29 Cal.4th 53 (2002) 15

Fletcher v. Security Pacific National Bank, 23 Cal.3d 442 (1979) 14

TABLE OF AUTHORITIES – Continued

Page

Gilkey v. Central Clearing Co., 202 F.R.D. 515 (E.D. Mich. 2001) 6

Keele v. Wexler, 149 F.3d 589 (7th Cir. 1998) 6

King v. Central Bank, 18 Cal.3d 840 (1977) 2

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134 (2003) 2, 14

Kraus v. Trinity Management Services, Inc., 23 Cal.4th 116 (2000) 13, 14

Kuhn v. Account Control Technology, Inc., 865 F.Supp. 1443 (D. Nev. 1994) 6

Lazar v. Trans Union LLC, 195 F.R.D. 665 (C.D. Cal. 2000) 13

Magallanes v. Superior Court, 167 Cal.App.3d 878 (1985) 15

Morgan v. Credit Adjustment Board, Inc., 999 F.Supp. 803 (E.D. Va. 1998) 6

Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973) 22

Perrone v. GMAC, 232 F.3d 433 (5th Cir. 2000) 7

Rosenbluth International, Inc. v. Superior Court, 101 Cal.App.4th 1073 (2002) 13

Schnall v. Amboy National Bank, 279 F.3d 205 (3rd Cir. 2002) 7

Serbin v. Ziebart International Corp., 11 F.3d 1163 (3rd Cir. 1993) 23

Stop Youth Addiction v. Lucky Stores, Inc., 17 Cal.4th 553 (1998) 2, 14

TABLE OF AUTHORITIES – Continued

Page

Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748 (1976) 21, 22, 24

Zamarippa v. Cy's Car Sales, Inc., 674 F.2d 877 (11th Cir. 1982) 6

STATUTES AND RULES

12 United States Code § 4301 7

15 United States Code § 45(1) 9

15 United States Code § 1640(a)(2)(A) 6

15 United States Code § 1667 7

15 United States Code § 1692, *et seq.* 6

16 Code of Federal Reglations § 260.7(e) 19

Alaska Statutes § 45.50.535 7

Alaska Statutes § 45.65.030 18

Arizona Revised Statutes § 44-1231-01 18

California Business & Professions Code § 17200, *et seq.* ..... *passim*

California Business & Professions Code § 17204 8

California Business & Professions Code § 17206 9

California Business & Professions Code § 17500 ..... *passim*

California Business & Professions Code § 17508.5 18

California Business & Professions Code § 17535 8

California Business & Professions Code § 17536 9

California Code of Civil Procedure § 425.16 15

TABLE OF AUTHORITIES – Continued

Page

California Code of Civil Procedure § 425.16(d) 10
California Code of Civil Procedure § 430.10(e) 2
California Code of Civil Procedure § 435 .....2, 14
California Code of Civil Procedure § 1021.5..... 5
Delaware Code Annotated, Title 6, § 2533(a)..... 7
Idaho Code § 44-602.....18
Illinois Revised Statutes Ch. 815, par. 425 18
Indiana Code § 24-5-17-10, *et seq.* 18
Michigan Statutes § 445.903(dd).....18
Minnesota Statutes § 325D.45 7
Minnesota Statutes § 325E.41.....18
Minnesota Statutes § 325F.43 18
Minnesota Statutes § 326F.47 18
Montana Code § 30-14-601, *et seq.* 18
78 Oklahoma Statutes § 54(a) 7
Oregon Revised Statutes § 661.210.....18
South Carolina Code Annotated § 39-53-10, *et seq.* 18
South Dakota Codified Laws § 37-7-2, *et seq.* 18
Texas Business & Commerce Code § 17.851, *et seq.* 18
Washington Revised Code § 19.06.010, *et seq.* 18
Wisconsin Statutes § 47.03.....18

TABLE OF AUTHORITIES – Continued

Page

TREATIES AND LAW REVIEW ARTICLES

Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).....15

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (5th ed. 2001) 24

INTEREST OF AMICUS[1]

The National Association of Consumer Advocates (NACA) is a nationwide, non-profit corporation whose 833 members are private and public sector attorneys, legal services attorneys, law professors, law students and non-attorney consumer advocates, whose practices or interests primarily involve the protection and representation of consumers. Its mission is to promote justice for all consumers. NACA is dedicated to the furtherance of ethical and professional representation of consumers. Its *Standards And Guidelines For Litigating And Settling Consumer Class Actions* may be found at 176 F.R.D. 375 (1998).

STATEMENT OF THE CASE

Respondent Kasky filed this action in 1998, alleging that petitioner Nike, Inc. made false or misleading assertions of fact concerning the working conditions in overseas facilities where Nike's products are manufactured. (*See* First Amended Complaint, par.1.) Kasky also specifically alleges that these false or misleading assertions were made "[i]n order to maintain and/or increase its sales and profits." (*Id.* at ¶ 75, 79.) Kasky's complaint, *inter alia*, asserts claims under California's Unfair Competition Law

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel, made a monetary contribution to the brief's preparation or submission.

("UCL"), Cal. Bus. & Prof. Code § 17200, *et seq.*, and False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500.

The complaint does not challenge Nike's political views, nor its opinions, nor its true statements of fact. It challenges only profit-driven, false factual claims.

Nike responded to the complaint by filing a "general demurrer" under California law. (Cal. Civ. Proc. Code § 430.10(e).) All material allegations of the complaint must be accepted as true in considering such a motion. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003). In reviewing an order sustaining a demurrer without leave to amend, "the allegations of the complaint must be liberally construed with a view to obtaining substantial justice among the parties." *King v. Central Bank*, 18 Cal.3d 840, 843 (1977). Moreover, a demurrer is directed solely to the legal viability of the causes of actions themselves, without regard to what relief, if any, is sought or might ultimately be authorized.[2] *Stop Youth Addiction v. Lucky Stores, Inc.*, 17 Cal.4th 553, 575 n.11 (1998). Therefore, if Kasky's complaint properly stated a claim as to any one or more of the several allegedly misleading statements, Nike's demurrer should have been overruled.

[2] Significantly, Nike did *not* follow the procedures authorized under California law for challenging particular *parts* of a complaint, including a prayer for unauthorized remedies. (Cal. Civ. Proc. Code § 435.) *See, e.g., Corbett v. Superior Court*, 101 Cal.App.4th 649, 656 (2002) (noting trial court grant of motion to strike prayer for disgorgement under UCL). Therefore, at this stage, it is unknown whether California courts would actually authorize any or all of the multiple remedies sought by Kasky, given the circumstances of this case.

SUMMARY OF ARGUMENT

Nike asks this Court to immunize a broad swath of corporate speech from consumer protection regulation. Essentially, Nike asks this Court to find that the First Amendment invalidates such regulation except in the narrow circumstance of conventional advertising claims directed to specific qualities of products sold at retail, at least unless false claims are proven to have been made maliciously. Whatever refinements, if any, to the "commercial speech" doctrine this Court should find appropriate, Nike's request for a wholesale scaling back of consumer protection regulation should be rejected.

In the Solicitor General's view, the Court should not address the substance of the First Amendment/consumer protection arguments, but instead should rule that California's broad standing provision is facially unconstitutional. However, upon closer review, the Solicitor General's argument is unpersuasive and would require this Court to effectively declare unconstitutional a large number of unrelated statutes, including the Truth In Lending Act, the Fair Debt Collection Practices Act, the Consumer Leasing Act, and the Truth In Savings Act. All of these federal statutes provide for the award of "statutory damages" even though the plaintiff fails to demonstrate reliance or damage flowing from the misleading communication or omission. Similarly, innumerable state statutes would also fail the Solicitor General's proposed test. Nor does the Solicitor General identify any persuasive reason for a constitutional distinction between private and public standing to enforce consumer protection statutes.

Finally, however this Court resolves the constitutional issues, NACA urges the Court to bear in mind the critical

importance to our national economy of statutes prohibiting deceptive advertising. The broad dissemination of truthful information about goods and services is necessary for the efficient allocation of resources. However, dissemination of *inaccurate* information distorts our economy, reduces consumer welfare and injures honest competitors. This Court should not lightly adopt any constitutional interpretation which would result in an increase in the amount of inaccurate information injected into the consumer marketplace.

ARGUMENT

I. CALIFORNIA'S BROAD STANDING PROVISION FOR CONSUMER PROTECTION ACTIONS IS NOT FACIALLY UNCONSTITUTIONAL

The Solicitor General raises a facial challenge to California's broad standing authorization in the UCL and FAL, an argument neither raised nor decided below. (Brief of the United States of America [hereinafter "USA"] at 8-9, 21-26.) NACA submits that the Solicitor General's arguments are unconvincing as a matter of precedent and policy, are based on a misperception of California law, and are not necessary to resolve the case before the Court.

A. The State of California's Decision To Authorize Equitable Actions By Non-Injured Individuals Is Not Unconstitutional

The California legislature has made the determination that the interests of California citizens are furthered by vigorous enforcement of its consumer protection

statutes. Recognizing the limited resources available to public prosecutors, the California legislature included in the UCL and the FAL authorization for individuals to act as "private attorneys general" to further that goal. As is true for a "public" attorney general, individuals fulfilling this role under California law need not have been personally injured by a practice to seek appropriate remedies. An uninjured plaintiff, however, can recover no monetary relief for him or herself.[3]

Clearly, California's statutes are unusual – perhaps unique. However, finding the provisions unique is far different than finding them unconstitutional. The Solicitor General's reasons for questioning the constitutionality of California's broad standing provisions are not persuasive.

First, in contrasting California's regime with *common law* actions for deception, the Solicitor General ignores the wide variation in elements required and remedies provided in *statutory* consumer protection statutes.

A comparison of the Solicitor General's "Question Presented" with the legal requirements for recovery of "statutory damages" under a variety of legislation illustrates the fallacy in the Solicitor General's argument. The Solicitor General's "Question Presented" is whether the First Amendment precludes statutory schemes which

[3] Neither the UCL nor the FAL provides for an award of attorneys fees to the prevailing party. Another California statute provides the possibility of an award of attorneys fees in a successful case. (Cal. Civ. Proc. Code § 1021.5.) However, such an award may be obtained only if, among other things, the plaintiff establishes that the lawsuit provided a "significant benefit" to the general public or a large class of persons. (*Id.*, subd. (a).)

permit a private party to challenge deceptive statements "if the private party himself did not rely on those statements, purchase the goods, or suffer any actual injury by reason of such reliance." (USA at I.) The Solicitor General proposes that this question be answered in the negative. Yet such an answer would compel invalidation of a large number of federal (as well as other state) statutes.

For example, the Truth In Lending Act ("TILA") provides for awards of statutory damages in certain cases. (15 U.S.C. § 1640(a)(2)(A).) To obtain statutory damages, the consumer need not show that he/she was deceived by the misstated financial disclosures or even that he/she was aware of the information in the disclosure statement. *Zamarippa v. Cy's Car Sales, Inc.*, 674 F.2d 877 (11th Cir. 1982); *Dzadovsky v. Lyons Ford Sales, Inc.*, 593 F.2d 538 (3rd Cir. 1979); *Gilkey v. Central Clearing Co.*, 202 F.R.D. 515, 522 (E.D. Mich. 2001). Nor need the consumer show any actual injury or damages from the misstatement. *Demando v. Morris*, 206 F.3d 1300, 1303 (9th Cir. 2000); *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 432 (5th Cir. 1998).

Similarly, under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, a debt collector is liable to any person to whom an offending communication was directed, regardless whether that person actually read or even received the communication. *Morgan v. Credit Adjustment Board, Inc.*, 999 F.Supp. 803, 805-806 (E.D. Va. 1998); *Kuhn v. Account Control Technology, Inc.*, 865 F.Supp. 1443, 1449-1450 (D. Nev. 1994). And, as with TILA, statutory damages are available under the FDCPA without proof of injury or actual damages. *Keele v. Wexler*, 149 F.3d 589, 593-594 (7th Cir. 1998); *Baker v. G. C. Services Corp.*, 677 F.2d 775, 780-781 (9th Cir. 1982). The

same point could be made about numerous other consumer protection statutes providing for "statutory damages", such as the Consumer Leasing Act, 15 U.S.C. § 1667 and the Truth In Savings Act, 12 U.S.C. § 4301.

Echoing California's reasons for its broad standing provisions in the UCL and FAL, the statutory damages provisions of these federal consumer protection statutes are often explained as providing an incentive for "private attorney general" enforcement. For example, the Third Circuit, in discussing the Truth In Savings Act, recently noted:

> We acknowledge that as a matter of policy, it seems odd to permit plaintiffs to sue banks for damages when they have personally suffered no financial loss as a result of the bank's TISA violation. [Footnote omitted.] This result, however, is what § 4310, as a "private attorney general" statute, contemplated. Although TISA authorizes the Federal Reserve Board to enforce the Act, *see*, 12 U.S.C. § 4309, the Board has limited resources to devote to enforcement, and congress may have deemed it more cost-effective to cede TISA enforcement to individuals in the private sector who stand to profit from efficiently detecting and prosecuting TISA violations.

Schnall v. Amboy National Bank, 279 F.3d 205, 216-217 (3rd Cir. 2002). *See also, Perrone v. GMAC*, 232 F.3d 433, 436-437 (5th Cir. 2000).

Similarly, many state consumer protection statutes authorize private suits for injunction (though not damages) without any showing of detrimental reliance or actual damages. (*See, e.g.*, Alaska Stat., § 45.50.535; 6 Del. Code Ann. § 2533(a); Minn. Stat. § 325D.45; 78 Okla. Stat.

§ 54(a).) As noted above, because Nike brings this petition without first testing the viability of the various forms of relief prayed for, neither the parties nor this Court can know which remedies (if any) the California courts would authorize on the facts alleged in the complaint. What is clear is that *many* states authorize *some* form of remedy for deceptive advertising without all of the "traditional" requirements described by the Solicitor General.

In any event, as the Solicitor General must acknowledge, *public* prosecutors have long been empowered to challenge deceptive advertising even though not personally injured or even exposed to the challenged practice. No one suggests that such public prosecutions violate the First Amendment. The obvious question, then, is why – from a *constitutional* standpoint – a legislative authorization to *private* attorneys general is different than a legislative authorization to *public* ones.[4] The Solicitor General notes several distinctions between private and public prosecutions (USA at 18-19), but fails to present a persuasive reason for finding these distinctions to be of constitutional significance.

First, the Solicitor General notes that government has "limited resources to prosecute consumer fraud" and therefore "must exercise their discretion so as to select for prosecution those cases that represent the best use of public resources." (USA at 18.)[5] For several reasons, this

[4] California's UCL and FAL authorize the state attorney general, each county's district attorney, and certain city attorneys to file suit on behalf of the general public. Cal. Bus. & Prof. Code §§ 17204, 17535.

[5] The Solicitor General couches all of his arguments within the context of two of the *federal* agencies charged with prosecuting consumer fraud –

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observation has no constitutional significance. As a factual matter, the accuracy of the observation is not apparent. While NACA certainly hopes and presumes that the "egregiousness" of the wrong is one significant factor in governmental prosecutors' selection of cases, it is surely not the only one. Government prosecutors are generally entitled to recover fines which may assist those agencies in funding future operations.[6] Moreover, as noted by the Solicitor General elsewhere, government enforcers are subject to political influence in exercising their prosecutorial discretion; it is far from clear that political pressure to pursue (or not to pursue) certain kinds of cases necessarily equates with "egregiousness" from a legal standpoint. In any event, the extent of prosecutorial resources provides no viable constitutional line-drawing distinction. Some state attorneys general have ample budgets available for consumer protection prosecutions, others have less. In some budget years, the FTC and Postal Service have far greater resources available than in other years. Following the Solicitor General's argument to its logical conclusion, the First Amendment would preclude public prosecutions

the Federal Trade Commission and the Postal Service. Comparing private causes of action under state law to federal agency prosecutions does not seem to be particularly helpful. However, some of the Solicitor General's argument could be applied to *state* public prosecutors, and we respond to them as if they were so stated. NACA does not understand the Solicitor General to be arguing that the First Amendment prohibits deceptive advertising suits by state public prosecutors.

[6] At the federal level, *see, e.g.*, 15 U.S.C. § 45(1) (civil fines of up to $10,000 per violation). At the state level, *see, e.g.*, Cal. Bus. & Prof. Code §§ 17206 and 17536 (civil penalties of up to $2,500 per violation in actions brought by public prosecutors, but not private plaintiffs).

by offices with large budgets, but not by those with more limited means.

Second, the Solicitor General states: "Unlike private parties, federal officials are politically accountable for their decisions. They are subject to public and congressional oversight, which creates strong incentives to exercise enforcement discretion wisely." (USA at 18.) But the Solicitor General has it backwards. From a First Amendment standpoint, "political and legislative oversight" (and, indeed, the governmental nature of the public agency itself), if anything, *increases* constitutional concerns. The First Amendment, after all, is fundamentally a restraint on *government,* not private actors. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 295 (2001).[7]

Third, the Solicitor General notes that "the government has discretion in selecting remedies that balance the public interest against legitimate rights of free expression. The government may, and frequently does, seek to remedy false statements through prospective relief requiring cessation of false advertising or correction of misstatements, without pursuing restitution or disgorgement of profit." (USA at 18-19.) This argument suffers from the same defect as the previous one: It *assumes* that governmental decision-making will keep free speech interests as a primary goal. But this Court's First Amendment jurisprudence

[7] Furthermore, though a defendant sued by a private plaintiff (whether injured or uninjured) can seek early dismissal under California's SLAPP statute, those procedures are not available if the action is brought by a public prosecutor. (Cal. Civ. Proc. Code § 425.16(d).) See Section I(B), *infra*.

assumes the opposite. Indeed, the First Amendment would be a superfluous provision if our society could always rely on governmental decisionmakers to fully protect free speech interests when other governmental interests are in play.[8] Moreover, whatever remedies are *sought* in a consumer protection case, it is a court that decides which remedies should or should not be granted. This ultimate judicial control over remedies applies equally to public or private suit.

Finally, the Solicitor General suggests that the FTC's and Postal Service's long-term presence as consumer protection agencies allows development of a "coherent body of decisions on consumer fraud" and helps to provide certainty and specificity to otherwise broad statutory provisions. (USA at 19.) This observation could support an argument for precluding *all* private consumer fraud cases (as well as state public prosecutions). It is irrelevant, however, to a distinction between private suit by injured – as opposed to uninjured – plaintiffs. If "piecemeal lawsuits, reflecting disparate concerns and not a coordinated enforcement program" (USA at 20) may constitutionally be brought by a person who heard or read Nike's misstatements and/or purchased Nike's products, then the same is true for a plaintiff who did not.

The Solicitor General also speculates that an uninjured plaintiff might be more likely than an injured

[8] Indeed, one may wonder why the Solicitor General believes that the California legislature did not "balance the public interest against legitimate rights of free expression" when it enacted the UCL and FAL, giving certain rights to public prosecutors and certain rights to private plaintiffs.

plaintiff to prosecute a deceptive advertising lawsuit for anti-speech reasons – that is, because of disagreement with the political or social content of the speech. But the validity of this supposition is far from obvious. An "injured" private plaintiff, who discovers that an advertisement inducing his or her purchase was misleading, might well be *more* likely to sue out of anger rather than a desire for compensation or to protect the public in the future, than an "uninjured" plaintiff. And a public prosecutor, if motivated by a desire for publicity to further his or her political career, might be more likely to pursue deceptive advertising claims against a company which sells politically unpopular products or services. Constitutional principles cannot be built on such quicksand.

In summary, the arguments presented in support of the Solicitor General's proposal are not persuasive and should be rejected.

B. California Law Contains Significant Limitations On The Ability Of An Uninjured Plaintiff To Recover Monetary Relief Under The UCL

The Solicitor General assumes that "[t]he California regime allows private lawsuits that are motivated, not by the need to redress for actual harm, but rather by disagreement with the speaker's policies, practices, or points of view, or by the prospect of financial gain." (USA at 23.) But the "California regime" to which the Solicitor General objects already has in place procedures to protect against the danger posited by him.

First, though it is true that "any person" can initiate an action under the UCL, it is *not* true that "any person"

can obtain monetary relief on behalf of others. Rather, "in any case in which a defendant can demonstrate a potential for harm or show that the action is not one brought by a competent plaintiff for the benefit of injured parties, the court may decline to entertain the action as a representative suit." *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 138 (2000). *See also, Rosenbluth International, Inc. v. Superior Court*, 101 Cal.App.4th 1073 (2002) (granting summary judgment against non-injured plaintiff who was not a competent representative). *And see, Lazar v. Trans Union LLC*, 195 F.R.D. 665, 673-74 (C.D. Cal. 2000) (declining to permit a "representative" claim for restitution where plaintiff not sufficiently typical of the injured public).

Second, because the substantive scope of the UCL is quite broad – reaching many different kinds of unfair business practices, along with deceptive advertising – the *potential* remedies are varied. While, in a proper case, relief can include significant monetary restitution, this is not a "one size fits all" statute. Even if a plaintiff (injured or not) demonstrates a violation of the UCL at trial, he/she has no *right* to any relief at all. Instead, the statute vests with the trial court the authority to fashion an appropriate remedy given all of the facts and circumstances of the case, including any equitable arguments raised by the defendant as to the appropriateness of any particular remedy. *Kraus, supra,* at 138.[9] Thus, the fact that the

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[9] Because the relevant provisions of the UCL are of relatively recent vintage, the scope of available relief in a particular case remains somewhat unsettled. Most of the cases reaching the State Supreme Court have done so on demurrers or motions for summary judgment, in which the elements of liability were at issue, not the scope of relief

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California courts have authorized substantial awards of restitution in cases involving unpaid wages (*Cortez v. Purolator Air Filtration Products, Inc.*, 23 Cal.4th 163, 178-179 (2000) or fraudulent business practices (*see, e.g., Fletcher v. Security Pacific National Bank*, 23 Cal.3d 442 (1979) (confirming possibility of restitution)) does not necessarily mean that the California courts would authorize such a remedy in a case such as this one. Because the case reaches this Court on a motion to dismiss, in which Nike chose not to raise this issue – instead, gambling on complete dismissal of the case – this Court cannot know how the California courts would resolve the issue.[10] However, a facial attack on the statutory scheme based upon mere speculation about potential remedies should be rejected.

Third, California provides procedures for the immediate striking from a complaint of any forms of relief unsupported by the factual allegations. (Cal. Civ. Proc. Code § 435.) *See, e.g., Corbett v. Superior Court*, 101 Cal.App.4th

available under any particular factual circumstances. *See, e.g., Stop Youth Addiction, supra*, at 575 n.11 ("We express no opinion on the appropriateness of SYA's prayer for 'restitution' to be paid to the state. The cause comes before us at the demurrer stage and 'a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint.' [Citation]"). *See also, id.* at 580 (Baxter, J., concurring) (emphasizing that the question of available relief remains open on remand and expressing skepticism that restitution would be appropriate in that case).

[10] The prayer for relief in the complaint in this case predated two recent cases in which the State Supreme Court has addressed the issue of restitution. The court narrowed the available relief in both instances. *See, Korea Supply, supra*, 29 Cal.4th 1134; *Kraus, supra*, 23 Cal.4th 116.

649, 656 (2002) (noting trial court grant of motion to strike prayer for disgorgement under UCL); *Canon U.S.A., Inc. v. Superior Court*, 68 Cal.App.4th 1 (1998) (ordering nationwide class action allegations stricken where factual allegations could support, at most, a state-wide class); *Magallanes v. Superior Court*, 167 Cal.App.3d 878 (1985) (because complaint's factual allegations, if proven, would not support an award of punitive damages, prayer for punitive damages properly stricken from complaint). Therefore, there need be no concern that unsupportable claims for large monetary recovery will persist beyond the initial pleading stage. Here, of course, Nike failed to make such a motion as an alternative to its motion to dismiss. Had it done so, the California courts might well have found, under the circumstances of this case, that some of the forms of relief sought by Kasky are not available to him in this action. Therefore, in reaching its decision in this case, this Court should not pay any heed to the rank speculation that harsh remedies could possibly be imposed on Nike.

Fourth, the Solicitor General's concern that private citizens could misuse California's consumer protection statutes to target "unpopular speech" (USA at 23, 25) is amply addressed by California's SLAPP statute.[11] (Cal. Civ. Proc. Code § 425.16). *See, Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53 (2002). That statute provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right

[11] The acronym "SLAPP" stands for "Strategic Lawsuits Against Public Participation." *See,* Canan & Pring, *Strategic Lawsuits Against Public Participation*, 35 Soc. Probs. 506 (1988).

of petition or free speech under the United States or California constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Id.*, subd. (b)(1).) Upon the filing of such a motion, discovery is automatically stayed and a defendant who prevails in striking part or all of the claims against it is entitled to an award of attorneys fees and costs. (*Id.*, subd. (c).)

II. THE CALIFORNIA COURT PROPERLY FOUND THAT AT LEAST SOME OF NIKE'S STATEMENTS WERE "COMMERCIAL SPEECH"

The California Supreme Court concluded that at least some of Nike's statements should be categorized as "commercial speech" under this Court's precedents, and, hence, that the case could proceed forward at this point. NACA believes that the lower court's conclusion was correct and that Nike's arguments to the contrary are unpersuasive. We wish to respond to two of Nike's points.

A. For Purposes Of The Commercial Speech Doctrine, Claims About A Product's Manufacture Or Origin Are A Type Of Product Claim

Nike repeatedly asserts that the statements challenged in the complaint did not refer to its products' characteristics or quality and therefore were not really claims about its products at all. (*See, e.g.*, Pet. at 6, 24, 35.) Nike argues that false claims about working conditions in its manufacturing facilities should be treated differently

than false claims about the quality or price of its products themselves. Further, while acknowledging that consumer purchasing decisions might have been influenced by its statements, Nike asserts, without support, that any such decisions would have been "moral" and "non-economic". (*Id.* at 22, 35-36.) In NACA's view, these arguments suffer from both philosophical and evidentiary defects.

It is true that the claims at issue in this case related to Nike's manufacturing operations, rather than to unique attributes of particular products. However, in NACA's view, this distinction is of little or no importance in resolving the First Amendment issues.

From the standpoint of traditional "commercial speech" analysis, a factual claim about a company's manufacturing facilities is likely to be at least as easily verifiable as a factual claim about the unique characteristics of a particular product. Indeed, since most companies will have far fewer manufacturing facilities than individual products, mistakenly false claims are *less* likely in the former context than in the latter.

From the standpoint of the governmental interest in protecting consumers from false or misleading marketplace information, Nike's distinction between manufacturing claims and product claims is illusory. Consumers' purchasing decisions are based on a wide variety of factors, including both product-specific and company-specific information. Government has as legitimate an interest in regulating a company's factual claims about its manufacturing operations as about other characteristics relating to the finished products sold to the public.

The significance of this governmental interest is demonstrated by the innumerable statutes regulating claims about

manufacturing circumstances. For example, many states have statutes which specifically prohibit deceptive claims that products sold to the public were made by the blind.[12] Presumably, in Nike's view, all such statutes must be declared unconstitutional limits on fully protected speech. After all, whether particular products (for example, athletic shoes) were manufactured by a blind person or a fully-sighted person is irrelevant to the quality and price of the final product. Nevertheless, some consumers are more likely to purchase products claimed to be made by the blind as part of a "moral judgment" (Pet. at 27) about the product's manufacture.

Similar examples abound. There are statutes regulating representations that products are made by Native Americans,[13] made by organized labor[14] or that the manufacturing process for the product used materials recycled from other products.[15] In none of these cases – at least

[12] Such statutes have been enacted in at least the following states: Minnesota (Minn. Stat. § 326F.47); Washington (Wash. Rev. Code § 19.06.010, *et seq.*); Wisconsin (Wisc. Stat. § 47.03); South Carolina (S.C. Code § 39-53-10, *et seq.*).

[13] *See, e.g.,* statutes passed by the states of Minnesota (Minn. Stat. § 325F.43); Arizona (Ariz. Rev. Stat. § 44-1231-01); Alaska (Alaska Stat. § 45.65.030); Montana (Mont. Code § 30-14-601, *et seq.*); South Dakota (S.D. Codified Laws § 37-7-2, *et seq.*); and Texas (Tex. Bus. & Com. Code § 17.851, *et seq.*).

[14] States with such statutes include Oregon (Or. Rev. Stat. § 661.210); Illinois (815 ILCS 425); and Idaho (Idaho Code § 44-602).

[15] States regulating such claims include Indiana (Ind. Code § 24-5-17-10, *et seq.*); Michigan (Mich. Stat. § 445.903(dd)); Minnesota (Minn. Stat. § 325E.41); and California (Cal. Bus. & Prof. Code § 17508.5). *See, Association of National Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995) (upholding constitutionality of California's statute).

(Continued on following page)

arguably – does the existence or non-existence of the claimed attribute affect the quality of the final product. And, certainly, it cannot be doubted that the economic status of Native Americans and persons with disabilities, and the social benefits from "recycling", are matters of public interest and debate.[16] Yet claims about such matters, if made for the purpose of increasing product sales, may be constitutionally regulated.

Moreover, the assertion that consumers are interested in the working conditions in Nike's manufacturing plants for "moral", "non-economic" reasons is without support in the evidentiary record and not at all obvious. It is quite possible that some consumers might believe that working conditions in the manufacturing plant are reflected in the quality (or quality control) of the final products. Happy, not-overly-tired workers, free from concerns about sexual or other abuse, might well produce higher quality products on a more consistent basis – or, at least, some consumers may feel that way. Thus, statements about working

On the federal level, the Federal Trade Commission has adopted a regulation prohibiting misrepresentations about the "recycled" content of products. 16 C.F.R. § 260.7(e).

[16] Beyond the categories of claims addressed by specific statutes, such as those listed above, many other similar claims are properly prohibited (if false) under general consumer protection statutes. Claims such as "We Are A Christian Company", "No Animals Were Harmed In The Making Of This Film", and "Made In The USA" may influence different purchasers differently. However, it is indisputable that such claims affect the purchasing decisions of many consumers.

conditions cannot be so easily divorced from product quality considerations.[17]

B. Improper "Viewpoint Discrimination" Is Not An Issue In This Case

Nike suggests that the application of consumer protection statutes to its claims about the working conditions in its manufacturing plants discriminates on the basis of viewpoint because other members of the public are free to criticize Nike without subjecting themselves to those statutes. (Pet. at 34-35.) This argument is unsound.

To the extent there is any "discrimination" in the application of the California statutes, it is discrimination based squarely on the fundamental justification for regulation of commercial speech itself. That is, factual claims by *a seller of goods and services* about its own products or operations made for commercial purposes are subject to reasonable regulation. Similar communications made *without* the commercial purpose of selling products or services are not subject to the same regulatory regime. For example, a claim by a manufacturer or seller that its product is of a certain quality when it is not is subject to

[17] Nike's proposed distinction between "moral" and "economic" decisionmaking is a false dichotomy. If not at the threshold of factual accuracy, where should a manufacturer's falsehoods be stopped? What if Nike's products were produced by slaves in Ethiopia? Could Nike legally conceal that fact from consumers? What if American cigarettes were produced in a Columbian factory that also processes cocaine? What if a French pharmaceutical company producing aspirin for the American market, also sells biological weapons to terrorists? NACA does not believe that the First Amendment protects concealment or misleading statements about such crucial facts.

false advertising laws. Yet if a private citizen expressed the same claim in a "Letter to the Editor," false advertising laws would not apply.

Nike is not subject to false advertising claims because of the *viewpoint* it expressed. It is subject to suit because it allegedly made false factual claims about the manufacturer of its own products. The reasons for treating such claims differently under the First Amendment are precisely those identified by this Court in its various commercial speech cases. The truth of the claims may be more easily verifiable by the speaker (*Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 772, n.24 (1976), the speech is less likely to be chilled by regulation, due to the profit motive underlying the speech (*id.*), and the speech is linked to commercial transactions over which the government has undoubted regulatory power (*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (Stevens, J.)).

Nike remains completely free to participate in the public debate about the "global economy," its effect on working conditions in underdeveloped countries, or any other issues of its choice. In doing so, however, it is rightly prohibited from making false factual claims related to the products it sells to consumers.

III. ACCURATE ADVERTISING ABOUT PRODUCTS AND SERVICES SERVES AN IMPORTANT ROLE IN OUR FREE ENTERPRISE SYSTEM; INACCURATE INFORMATION HAMPERS FAIR COMPETITION AND INJURES CONSUMERS

The broad dissemination of *accurate* information is necessary for the efficient allocation of resources in our free market economy. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (information about the availability, nature and prices of products and services "performs an indispensable role in the allocation of resources in a free enterprise system [and] serves individual and societal interests in assuring informed and reliable decisionmaking."); *Va. Pharmacy Bd., supra,* 425 U.S. at 765 (accurate information is "indispensable to the proper allocation of resources in a free enterprise system"); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 363-64 (1973) (noting testimony of the Under Secretary of the Treasury, supporting enactment of the Truth In Lending Act, that "such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours, whose ability to provide desired material at the lowest cost is dependent on the asserted preferences and informed choices of consumers" [footnote omitted]).

Accurate information about products and services thus furthers the interests of both consumers and producers. For consumers, access to such information permits them to make welfare-maximizing purchase decisions, attuned to each consumer's personal desires. For producers, the dissemination of accurate information reduces

individual transaction costs and allows more efficient producers to reap a larger share of the available market.

However, it is only the dissemination of *accurate* information which furthers these public policy interests. The dissemination of false or misleading information (whether intentional, reckless or negligent) distorts the allocation of resources, injuring both competitors and consumers. It is a fundamental tenet of our economic system that overall consumer welfare is maximized where each individual consumer is free to make purchasing decisions based upon accurate information about the nature, quality and price of the goods and services available to them. The circulation of false information reduces consumer welfare.

Prohibitions upon false and misleading advertising are equally important to protect honest competitors. From an economic perspective, a false claim about the characteristics or circumstances surrounding one's own product is no different than a falsely disparaging claim about a competitor's product. Both tend to result in consumer purchases of the "wrong" product (*i.e.,* not the product the consumer would have selected had all accurate information been known). The person who disseminated the inaccurate information earns an undeserved profit; the competitor who did not is robbed of his or her rightful sales, due to consumers' mistaken purchases. *See generally, Serbin v. Ziebart International Corp.*, 11 F.3d 1163 (3rd Cir. 1993) (discussing the Lanham Act's purpose as protecting honest competitors against acts of "unfair competition", principally false advertising).

For these reasons, every State in the Nation, as well as the Federal Government, has enacted legislation

prohibiting false or misleading advertising.[18] This Court has repeatedly recognized the significant governmental interests underlying those statutes. *See, e.g., Edenfield v. Fane,* 507 U.S. 761, 769 (1993) ("[T]here is no question that Florida's interest in ensuring the accuracy of commercial information in the market-place is substantial."); *Va. Pharmacy Bd., supra,* 425 U.S. at 781 (Stewart, J., concurring) ("[T]he elimination of false and deceptive claims serves to promote the one facet of commercial price and product advertising that warrants protection – its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking.").

These considerations apply fully to Nike's (allegedly) false and misleading statements challenged in this action. Nike falsely represented facts about the working conditions in the manufacturing facilities where its products were produced. To the extent that such working conditions are important to the purchasing decisions of some consumers, those consumers presumably were more likely to purchase Nike's products.[19] Such false advertising undermined the efforts of those of Nike's competitors who actually *did* incur greater costs to obtain higher quality working conditions in their manufacturing facilities. A competitor with more "worker-friendly" facilities should

[18] The state statutes are collected and briefly analyzed in Appendix A of the National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (5th ed. 2001). Selected consumer protection rules promulgated by the Federal Trade Commission can be found as Appendix B to the same publication.

[19] The complaint specifically alleges that Nike *intended* that its statements would make such purchases more likely. (*See, e.g.,* First Amended Complaint, par. 75.)

properly be able to command higher prices for its products from those consumers interested in rewarding such practices with brand loyalty. Yet if, as alleged, Nike injected inaccurate information about is own manufacturing facilities into the marketplace, consumers (or, at least, *some* consumers) were unable to differentiate between those brands which did have "worker-friendly" facilities, and those that did not. Thus, Nike's inaccurate statements distorted the efficient marketplace for athletic-wear, to the detriment of both consumers and competitors. California surely had and has a significant governmental interest in prohibiting such distortions.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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